

DFARS Case 2003-D-087
COMMENTS

1. Paperwork Reduction Act:

1.1 The requirements in the proposed rule constitute an information collection requirement which imposes a burden on contractors, as defined in 5 CFR 1320.3(b). Section C of the Supplementary Information does not address the additional information collection requirements required for a contractor to comply with FAR 43.104 in the event of direction issued to a contractor by a government official other than a Contracting Officer. This information collection requirement includes Notifications of Changes, and supporting records, resulting from directions issued to a contractor by a Combatant Commander or his authorized subordinate commander. This requirement is explained in detail later in these Comments.

1.2 The reporting and recordkeeping associated with Notifications of Changes (FAR 43.104) would be considered usual and customary in most circumstances. However, the this DFARS revision proposes to codify the authority of government officials other than a warranted Contracting Officer to issue directions to a contractor that will affect schedule, cost, and technical requirements of contract. Every direction issued to a contractor by an authorized subordinate commander will constitute a contract change, either within or outside the scope of a contract, for which a contractor must execute notices and records as required by FAR 43.104.

1.3 The additional paperwork burden for a contractor that should not be considered usual and customary is caused by the fact that there may be hundreds of subordinate commanders in a specific geographic area who may be authorized by a Combatant Commander to issue directions to contractors. In a contingency or peacekeeping operation or war (i.e. Haiti, Balkans, Iraq) there are hundreds of subordinate military commanders below the Combatant Commander and are geographically dispersed throughout an area of operations. The normal notifications of changes process assumes that such changes are the exception and a contractor will be able to communicate directions issued by other government officials to the Contracting Officer for a determination within a reasonable period of time.

2. Part 207.105 – Contents of written Acquisition Plans:

2.1 The proposed rule states “Ensure the requirements of DoD Instruction 3020.37, Continuation of Essential DoD Contractor Services During Crisis, are addressed.” However, the proposed rule does not provide guidance as to how to implement the requirements of the DoD instruction. The implementation of DoD Instruction 3020.37 by the military services was addressed in GAO Report #GAO-03-695, June 2003 (Contractors Provide Vital Services to Deployed Forces but Are Not Adequately Addressed in DOD Plans).

2.2 GAO stated in the report that they found “*little evidence that the DOD components are implementing the DOD Instruction.*” The report also stated “*none of the services are conducting the annual review to identify mission essential services that are being provided by contractors. Service and combatant command officials we spoke with were generally unaware of the requirement to review contracts annually and identify essential services. None of the regional combatant commands, service component commanders, or installations visited during our review had an ongoing process for reviewing contracts as required by DOD Instruction 3020.37.*”

2.3 The GAO report continues as follows: “*DOD has limited knowledge of the extent to which DOD Instruction 3020.37 is being implemented.*” “*There is no DOD-wide guidance that establishes baseline policies to help ensure the efficient use of contractors that support deployed forces.*”

2.4 Implementation of the tasks and requirements covered in the proposed rule based on a high degree of joint acquisition planning by the staff of a combatant commander and the contractor in advance of an operation in which a contractor accompanies military forces. However, the GAO report shows that such planning is not done well, if at all. The proposed DFARS revision should provide specific guidance as to how to incorporate the requirements of DoD Instruction 3020.37 in the acquisition planning process. It is too late to start planning after a contractor is directed to deploy and arrives in a theater of operations.

3. Part 225.7402-1 – Government support of contractor personnel accompanying a force:

3.1 Part 225.7402-1(b) states that government-provided support to a contractor should be set forth in each contract or in the operation order of a combatant commander. Specifying the support requirements in a contract assumes a high-order of acquisition planning and coordination by a Contracting Officer with respect to the military organization(s) who will have to provide the resources to a contractor once deployed to an area of operations. It also assumes that a Contracting Officer will be able to provide government-furnished resources to a contractor when the resources are owned or controlled by military commanders who have no connection with the contract. A combatant commander, acting through his subordinate commanders, will make the ultimate decision on providing resources to a contractor regardless of what's written in the contract. A subordinate commander will not provide resources to a contractor unless he/she receives such an order through a military chain of command.

3.2 Recommend the following sentence be added as Part 225.7402-1(c) in order to enhance coordination and communication between Contracting Officers and military organizations who would provide resources to deployed contractors: "The Contracting Officer shall specify in the contract or task order, the military organization(s) that will furnish government-provided support to a contractor, as described in PGI 225.7402-1."

3.3 Specifying government-furnished support to a contractor in a combatant commander's operation order also assumes high-degree of acquisition planning between a Contracting Officer and the staff of that combatant commander. The GAO report mentioned above shows that this does not happen. The proposed rule assume that a Contracting Officer has communicated the support requirements to the combatant commander, the information is incorporated into an operation order, and the operation is disseminated to subordinate commanders who would actually provide resources to a contractor. Unless a Contracting Officer is on the staff of a combatant commander, the aforementioned tasks will be difficult to accomplish. The lack of communication and coordination between a contracting officer and a combatant commander's staff is further complicated when there is no designated CAO for the area of operations or a contracting officer retains contract administration in accordance with DFARS 242.2002, rather than assigning a contract to a CAO.

4. Part 252.225-70XX(a) – Definitions:

4.1 The proposed definition of "Combatant Commander" encompasses "any subordinate commander given authority by that Combatant Commander to issue direction to contractors in a specified geographical area or for a specific functional area." In a military area of operations, such as Iraq, there are hundreds, possibly thousands of subordinate commanders below the combatant commander. In the Army alone, this ranges from Division Commanders (Major General/O8) to Company Commanders (Captain/O3 or Lieutenant/O2) throughout the theater. The ambiguity of the definition in the proposed rule will create a situation where hundreds of subordinate commanders could be authorized to issue directions to contractors which will affect cost, schedule, and performance of contracts.

4.2 The proposed rule should provide specific guidance as to criteria for authorizing subordinate commanders to issue direction to a contractor and should address the role of a Contracting Officer in

these decisions. If Contracting Officers are an integral part of the authorization process, there will be a variety of people in the position of issuing directions to contractors, potentially confusing or conflicting. All directions issued to a contractor by a subordinate commander will constitute a contract change, requiring a Change Notification in accordance with FAR 43.104, since the direction was issued by a government official other than a contracting officer.

4.3 If subordinate commanders are authorized to issue directions to contractors, without approval by contracting officers, then every such direction may constitute a contract change, with cost, schedule, or technical ramifications. A contractor is required by FAR 43.104 to submit a notification of changes to the contracting officer if direction is received from a government official other than a contracting officer or specifically authorized representative of the contracting officer. A contractor may have to implement change order accounting procedures in accordance with FAR 43.203 in order to segregate and definitize costs associated with contract changes resulting from directions of subordinate commanders. Ultimately a contractor may be placed in the tenuous position of determining if a subordinate's commander's directions conflict with the terms of its contract.

5. Part 252.225-70XX(b)(2) – General:

5.1 This part states “*The contractor accepts the risks associated with required contract performance in such operations.*” A contractor's assumption of risk must be based on reasonable knowledge of the situation and the ability to mitigate risks. The military will always be in a superior position of knowledge with respect to the enemy situation and the dangers that a contractor may be faced with when supporting deployed forces. It is not uncommon for contractors to deploy to an area of operations with little more information from the government about the situation than what you can obtain from CNN. The sentence in the proposed rule requiring contractors to accept all risks will mean that contractors will expect significant information from the government and inclusion in advance planning before agreeing to deploy.

6. PGI 225.74 – Defense Contractors Outside the United States:

6.1 The proposed rule assumes there is a cognizant CAO for the country or area in which military forces will be deployed or assumes that a Contracting Officer will assign contract administration to a CAO. Frequently, there is no CAO for an area of operations or a contracting officer retains contract administration. The proposed rule should specify how a U.S.-based contracting officer, with no organizational connection to a combatant commander, would perform the functions covered in this part when there is no CAO for the area of operations or if the contracting officer does not assign the contract to a CAO.